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No. 94-1420

In the Supreme Court of the United States

OCTOBER TERM, 1994

L. VIRGINIA VENTRE, PETITIONER

v.

ROGER W. JOHNSON, ADMINISTRATOR,
GENERAL SERVICES ADMINISTRATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a court of appeals has jurisdiction to review the decision of a district court outside its circuit to transfer an action to a district court within its circuit.

2. Whether the jury trial and compensatory damages provisions of the Civil Rights Act of 1991 apply to events occurring prior to its enactment when the action is filed in federal court after its enactment.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A3) is unreported, but the decision is noted at 39 F.3d 1179 (Table). The final order of the district court (Pet. App. C1) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 28, 1994. A petition for rehearing was denied on November 25, 1994. Pet. App. B2-B3. The petition for a writ of certiorari was filed on February 15, 1995.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and 2101(c).

STATEMENT

1. Petitioner, an employee of the General Services Administration's Virginia-based Federal Supply Service, alleged that she was passed over for promotions in 1988 and 1989 because of sex discrimination. Pet. 3. After exhausting her administrative remedies, petitioner brought this action in the United States District Court for the District of Columbia on March 23, 1992, under Title VII of the Civil Rights Act of 1964, seeking, *inter alia*, compensatory damages and a jury trial. Pet. 3-4. On respondent's motion, the district court struck both those items from the complaint because they were not authorized by the version of Title VII effective in 1988 and 1989. Pet. 4.

Over petitioner's objection, the district court also granted respondent's motion to transfer the case pursuant to 28 U.S.C. 1404(a) to the United States District Court for the Eastern District of Virginia, finding that

> six of the seven witnesses and [petitioner] are in Virginia. The remaining witness is located in Texas. Moreover, all of the events are alleged to have occurred in Virginia. The only connection with this district is that the nominal [respondent] has his office in the District of Columbia. However, the Federal Supply Service, the entity alleged to have engaged in the unlawful employment practice against [petitioner], is located in Virginia.

C.A. App. 154-155.

In the District Court for the Eastern District of Virginia, petitioner did not seek to retransfer the action. After a trial on the merits before a magistrate judge, judgment was entered for respondent. Pet. 5; Pet. App. C1.

2. The court of appeals affirmed. Pet. App. A1-A3. It declined to review petitioner's claim regarding the District Court for the District of Columbia's transfer order, holding that it lacked jurisdiction to review directly a transfer order entered by a district court in another circuit. *Id.* at A2. The court also rejected petitioner's claim that she was entitled to seek compensatory damages and have a jury decide those damages. The court found that because the conduct giving rise to the action occurred before the effective date of the Civil Rights Act of 1991, her suit was governed by the provisions previously in effect, which petitioner conceded did not permit compensatory damage awards or require jury trials. *Id.* at A2-A3.

ARGUMENT

1. Petitioner suggests (Pet. 6-8) that the courts of appeals are split on whether they have jurisdiction to review transfer orders entered by district courts outside their circuit. To the contrary, the courts are in general agreement over the appropriate means for obtaining review of district court orders transferring venue of a suit.

Orders granting or denying transfer motions are interlocutory and not immediately appealable as of right because they do not meet the requirements of the collateral order doctrine. See *Ukiah Adventist Hosp.* v. *FTC*, 981 F.2d 543, 546 (D.C. Cir. 1992) (collecting cases), cert. denied, 114 S. Ct. 88 (1993); cf. *Norwood* v. *Kirkpatrick*, 349 U.S. 29, 31 (1955).

Before a transfer order becomes effective, however, the court of appeals for the transferor district may review such orders either by a writ of mandamus or by a certified interlocutory appeal under 28 U.S.C. 1292(b) if the other conditions for invoking those review procedures are met. See *Stewart Org., Inc.* v. *Ricoh Corp.*, 487 U.S. 22, 24-25 (1988); *Van Dusen* v. *Barrack*, 376 U.S. 612, 615 n.3 (1964).

After the transfer has taken place, the transferee district court has jurisdiction to consider any motions, including a motion to retransfer the suit to the original or any other venue. In making such a decision, the transferee district court is governed by traditional law-of-the-case principles. See *Christianson* v. *Colt Indus. Operating Corp.*, 486 U.S. 800, 816, 819 (1988). If no appellate review is obtained at that time, the transferee district court's decision denying another transfer may be raised on appeal after final judgment. See *Hoffman* v. *Blaski*, 363 U.S. 335, 341 n.9 (1960).

A basic rule underlying this procedural framework is that a regional court of appeals may review only the decisions of district courts within its circuit. See 28 U.S.C. 1294(1) ("appeals from reviewable decisions of the district and territorial courts shall be taken * * * [f]rom a district court of the United States to the court of appeals for the circuit embracing the district"); cf. *Celotex Corp.* v. *Edwards*, 115 S. Ct. 1493, 1501 (1995). Thus, the courts of appeals have held with virtual unanimity that they do not have jurisdiction to review directly the decisions of district courts outside their circuit. See, *e.g.*, *Reyes* v. *Supervisor of DEA*, 834 F.2d 1093, 1095 (1st Cir. 1987); *In re Grand Jury Proceedings (Kluger)*, 827 F.2d 868, 871 (2d Cir. 1987); *Brock* v. *Entre Computer*

Ctrs., Inc., 933 F.2d 1253, 1257 (4th Cir. 1991); *In re Corrugated Container Anti-Trust Litigation*, 620 F.2d 1086, 1090 (5th Cir. 1980), cert. denied, 449 U.S. 1102 (1981); *Moses* v. *Business Card Express, Inc.*, 929 F.2d 1131, 1136 (6th Cir.), cert. denied, 502 U.S. 821 (1991); *Alexander* v. *Erie Ins. Exch.*, 982 F.2d 1153, 1156-1157 (7th Cir. 1993); *TEC Floor Corp.* v. *Wal-Mart Stores, Inc.*, 4 F.3d 599, 602-603 (8th Cir. 1993); *Chrysler Credit Corp.* v. *Country Chrysler, Inc.*, 928 F.2d 1509, 1518 (10th Cir. 1991); *Roofing & Sheet Metal Servs., Inc.* v. *La Quinta Motor Inns, Inc.*, 689 F.2d 982, 985-936 (11th Cir. 1982); *Starnes* v. *McGuire*, 512 F.2d 918, 924 (D.C. Cir. 1974) (en banc).[1] The Fourth Circuit's rule on this matter has been firmly established by a line of decisions beginning in 1964. See, *e.g.*, *Brock*, 933 F.2d at 1257; *Linnell* v. *Sloan*, 636 F.2d 65, 67 (4th Cir. 1980); *Preston Corp.* v. *Raese*, 335 F.2d 827, 828 (4th Cir. 1964).

Petitioner claims (Pet. 6) that four circuits have rejected this rule. However, the dicta of older cases in the Second and Fifth Circuits that petitioner relies upon (Pet. 6 nn.3 & 5) seem to have been superseded by later cases in their respective circuits. See *In re Grand Jury Proceedings (Kluger)*, 827 F.2d at 871; *In re Corrugated Container Anti-Trust Litigation*, 620 F.2d at 1090. And the Third Circuit cases petitioner cites (Pet. 6 n.4) both involved situations in

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[1] Congress has created narrow exceptions to the general rule, none of which applies to this case. See 28 U.S.C. 1292(c) and (d) (jurisdiction of the Court of Appeals for the Federal Circuit). See also *Astarte Shipping Co.* v. *Allied Steel & Export Serv.*, 767 F.2d 86, 87 (5th Cir. 1985) (discussing appellate jurisdiction over cases transferred by the Judicial Panel on Multidistrict Litigation).

which a court of appeals was reviewing (or discussing) a decision of a district court *within* its circuit not to retransfer a suit that had been transferred to it. See *Nascone* v. *Spudnuts, Inc.*, 735 F.2d 763, 765-766 (3d Cir. 1984); *Gulf Research & Dev. Co.* v. *Leahy*, 193 F.2d 302, 304 (3d Cir. 1951), aff'd mem. by an equally divided court, 344 U.S. 861 (1952); see also *Abels* v. *State Farm Fire & Casualty Co.*, 770 F.2d 26, 28 n.2 (3d Cir. 1985).

There are dicta in a few Ninth Circuit cases (Pet. 6 n.6, 8) that support petitioner's position. See *United States* v. *French*, 787 F.2d 1381, 1383 n.3 (1986) (describing earlier discussions of the issue as dicta). However, petitioner does not cite (nor have we been able to discover) any reported case in which a court of appeals has actually relied on such dicta (or anything else) to review directly a transfer order made by a district court of another circuit. Accord *La Quinta Motor Inns*, 689 F.2d at 987 ("we know of no case in which [any] circuit * * * has in fact reviewed a transfer order issued by a district court in another circuit"); 15 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 3846, at 359 n.9 (1986) (same). The dicta cited by petitioner therefore do not establish an active circuit conflict.

Petitioner suggests (Pet. 8-14) that the existing methods of securing appellate review, *i.e.*, either an interlocutory appeal to the transferor court of appeals or an appeal of the denial of a motion to retransfer by the transferee district court, constitute bad policy. Petitioner's proposal to permit the transferee court of appeals to review the transferor district court's decision would, however, require the district courts to serve two masters—their own court of appeals and the transferee court of appeals. Cf. *In re Korean Air*

Lines Disaster of Sept. 1, 1983, 829 F.2d 1171, 1182-1183 (D.C. Cir. 1987) (D.H. Ginsburg, J., concurring), aff'd *sub nom. Chan* v. *Korean Air Lines, Ltd.*, 490 U.S. 122 (1989).[2] The existing methods provide adequate opportunities for appellate review without placing district courts in this unusual position.

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[2] Even if the Fourth Circuit had had jurisdiction over the question, the District Court for the District of Columbia's decision to transfer was plainly correct because venue did not lie in the District of Columbia. Venue in Title VII cases is governed by 42 U.S.C. 2000e-5(f)(3). See *Johnson* v. *Payless Drug Stores Northwest, Inc.*, 950 F.2d 586, 587-588 (9th Cir. 1991), cert. denied, 112 S. Ct. 3044 (1992); *Bolar* v. *Frank*, 938 F.2d 377, 378-379 (2d Cir. 1991). Section 2000e-5(f)(3) provides that

> an action [arising under Title VII] may be brought in any judicial district in the State in which the unlawful employment practice is alleged to have been committed, in the judicial district in which the employment records relevant to such practice are maintained and administered, or in the judicial district in which the aggrieved person would have worked but for the alleged unlawful employment practice, but if the respondent is not found within any such district such an action may be brought within the judicial district in which the respondent has his principal office.

The District Court for the District of Columbia found that "the employment practice is not alleged to have been committed here, [petitioner's] employment record[s] relevant to her claim are not maintained here, and if [petitioner] had been promoted, she would not be working here." C.A. App. 155. Thus, the plain language of the statute required that petitioner's action had to be either transferred to the District Court for the Eastern District of Virginia or dismissed. See *Minnette* v. *Time Warner*, 997 F.2d 1023, 1026 (2d Cir. 1993); *Stebbins* v. *State Farm Mut. Auto Ins. Co.*, 413 F.2d 1100, 1102-1103 (D.C. Cir.), cert. denied, 396 U.S. 895 (1969).

2. Petitioner contends (Pet. 15-19) that although the alleged discriminatory acts occurred in 1988 and 1989, she is entitled to the benefits of the compensatory damage and jury trial provisions of the Civil Rights Act of 1991, Pub. L. No. 102-166, § 102, 105 Stat. 1072, because she did not file her suit until March, 1992.[3] In *Landgraf* v. *USI Film Products*, 114 S. Ct. 1483, 1508 (1994), this Court held that those provisions did not apply to a suit pending before the courts on November 21, 1991, the effective date of the 1991 amendments. Petitioner suggests (Pet. 15-17) that the holding should be limited solely to suits filed prior to November 21, 1991, rather than suits based on conduct occurring prior to that date. Such a claim is inconsistent with the express rationale of *Landgraf*.

In *Landgraf*, this Court reasoned that "the event to which the new damages provision relates is the discriminatory conduct of respondents' agent * * *; if applied here, [the compensatory damages] provision would attach an important new legal burden to that conduct. The new damages remedy * * *, we

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[3] The court of appeals had jurisdiction over this issue because it was reviewing its district court's denial of petitioner's motion to reconsider the District Court for the District of Columbia's decision on the issue. Petitioner filed a motion for reconsideration on this question in the District Court for the District of Columbia on March 9, 1993. C.A. App. 7. The motion was not decided by that court prior to transfer and thus was pending before the District Court for the Eastern District of Virginia after the transfer. See *White* v. *Investors Management Corp.*, 888 F.2d 1036, 1039 (4th Cir. 1989). The entry of final judgment by that district court in favor of respondent implicitly included a denial of all pending motions, including the motion for reconsideration. See *Dunn* v. *Truck World, Inc.*, 929 F.2d 311, 313 (7th Cir. 1991) (collecting cases).

conclude, is the kind of provision that does not apply to events antedating its enactment in the absence of clear congressional intent." 114 S. Ct. at 1506. Finding no such intention manifested in the text, structure, or legislative history of the Act, *id.* at 1491-1496, the Court held that the compensatory damage provision of the Civil Rights Act of 1991 should not "apply to cases arising before its enactment," *id.* at 1508.[4] Following *Landgraf*, the courts of appeals have uniformly held that it is the date the conduct occurred, rather than the date the suit was filed, that dictates whether the 1991 amendments will apply. See, *e.g.*, *Theard* v. *Glaxo, Inc.*, 47 F.3d 676, 679 (4th Cir. 1995); *Maitland* v. *University of Minnesota*, 43 F.3d 357, 361 n.3 (8th Cir. 1994); *Alexander* v. *Gerhardt Enters., Inc.*, 40 F.3d 187, 192 (7th Cir. 1994); *Garcia* v. *Elf Atochem North America*, 28 F.3d 446, 449 (5th Cir. 1994).

Petitioner also suggests (Pet. 17-18) that the presumption against statutory retroactivity relied upon in *Landgraf* is limited to laws governing private parties. However, this is contrary to the Court's specific observation that, "[w]hile the great majority of our decisions relying upon the anti-retroactivity presumption have involved intervening statutes burdening private parties, we have applied the presumption in cases involving new monetary obligations that fell only on the government." 114 S. Ct. at 1500 n.25; see, *e.g.*, *United States* v. *Magnolia*

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[4] The Court also concluded that Congress had made jury trials available only where compensatory damages were sought, and therefore the jury trial provision "must * * * fall with the attached damages provisions." 114 S. Ct. at 1505.

Petroleum Co., 276 U.S. 160, 162-163 (1928); *White* v. *United States*, 191 U.S. 545, 552 (1903).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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